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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

TONY ASBERRY,

Defendant and Appellant.

F034108

(Super. Ct. No. 633542-6)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Stephen J. Kane, Judge.

Carol A. Navone, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Robert R. Anderson, Assistant Attorney General, Louis M. Vasquez and Robert P. Whitlock, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION AND OVERVIEW

On May 21, 1999, a complaint was filed in Fresno County Superior Court charging defendant Tony Asberry with robbing Marvin Edwards (Pen. Code, § 211).[1]

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[1] Unless otherwise specified, all statutory references are to the Penal Code and all dates reference the year 1999.

Defendant waived his right to counsel on May 25 and represented himself at the preliminary hearing. Probable cause was found and an information filed. Defendant accepted representation by the public defender's office. Trial was set for August 5 and then continued to August 16.

At trial confirmation on August 12, defendant refused to waive his right to a speedy trial and personally informed the court that he "wanted to proceed on the regular scheduled date and time for my jury trial" and that if "the attorney is not ready, then I'll proceed pro per."

The matter was called for trial on August 16. Defendant stated that he did not trust his attorney, Ralph Torres, and wanted to represent himself. He was prepared and wanted trial to commence immediately. He did not want a *Marsden* hearing because appointment of another attorney would require a continuance of the trial date, and he was "tired of sitting [in] jail."

Trial began the following day. At the outset of the proceedings, defendant was arraigned on a first amended information. He pled not guilty to the robbery charge, but admitted a section 667.9 enhancement[2] and further admitted having suffered six prior convictions within the meaning of the three strikes law and having served four prior prison terms within the meaning of section 667.5, subdivision (b).

A jury was selected and evidence taken. The prosecution relied on two witnesses: The victim, Marvin Edwards, and Brian Ridenour, the City of Fresno police officer to whom Edwards reported the crime. Edwards testified that he came to Fresno that afternoon to find his girlfriend, Rachel Casias. He encountered defendant, who agreed to help him locate her. They drove around, stopping at various hotels on G Street. A man who was unknown to him soon joined them. After about an hour, defendant and the other

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[2] That defendant knew or should have known that the victim was 65 or older.

man demanded money. He refused to pay them because they had not found Rachel. Defendant and the other man then beat and choked him into unconsciousness. They stole his wallet containing $2,000 and his glasses. After he regained consciousness, a man returned his glasses. Another man returned his empty wallet. This second man told him that he had seen two men running and that one of them had thrown the wallet into a trashcan.

Officer Ridenour testified that Edwards told him that he was struck several times and that his wallet was stolen. Edwards's eyes were bruised, and he had suffered cuts and abrasions on his face. Edwards did not tell him that he had been choked or lost consciousness.

Defendant called Abdul Saeed, Lois Bradley, and Lenetta McArn. Saeed and Bradley both testified that they saw Edwards being beaten by a lone man who was not defendant. Bradley testified that she saw this man take Edwards's wallet and run away. McArn testified that defendant and Rachel had lived together in her home for a time. Edwards came to the house several times looking for Rachel and telephoned her frequently. Edwards offered McArn money to find Rachel for him.

The jury returned a guilty verdict.

At defendant's sentencing hearing, a "Mr. Taleisnik" appeared with him. He asked for a continuance of "a few weeks" so that he could "connect[]" with an unnamed family member defendant told him had the "ability to retain." The request was denied. Defendant was sentenced to 10 years' imprisonment plus an indeterminate term of 25 years to life.

Seeking to negate the effect of his decisions to represent himself, to insist on a speedy trial, to refuse a *Marsden*[3] hearing and admit all of the special allegations,

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3 *People v. Marsden* (1970) 2 Cal.3d 118.

defendant contends that: (1) his waiver of counsel was not voluntary and intelligent; (2) advisory counsel should have been appointed; (3) an investigator should have been assigned; (4) his admissions were not voluntary or intelligent; (5) the sentencing hearing should have been continued. None of these arguments is persuasive. Defendant's constitutional protections were respected at all stages of the proceedings. His decisions were knowing and voluntary within the meaning of the law. Neither legal error nor abuse of discretion appears.

DISCUSSION

I. Defendant validly waived his right to counsel.

Defendant contends his waiver of counsel on August 16 was defective because his assertion of the right to self-representation was conditioned on Torres's inability to proceed to trial on the scheduled day. The court should first have determined whether Torres could try the case within the statutory period and if not, why, and how long a continuance was necessary. The court should then have explained to defendant all of his available options and the advantages and disadvantages of choosing one course over the other. Moreover, a *Marsden* hearing should have been held because defendant might have been willing to waive his right to a speedy trial to give a new attorney time to prepare. Instead, the court and the prosecutor combined to encourage an immediate trial without time for him to prepare. As will be explained, defendant's arguments are based on a selective and distorted reading of the record. In fact, defendant insisted on his right to trial within the 60-day statutory period (see § 1382), demanded that Torres be discharged because he had did not trust him, invoked his right to self-representation, and refused a *Marsden* hearing.

A. Facts

On May 25 defendant appeared before Judge Levis for a *Faretta* hearing.[4] Defendant stated that he wanted to represent himself because he had permitted the public defender's office to represent him on another case, and he was extremely dissatisfied. Defendant was asked if he understood the nature of the charges and the outcome. He replied that he knew he faced life imprisonment if convicted. The court then asked, "Do you understand that representing yourself is normally not the wisest choice to make and that in conducting a defense you could, in fact, convict yourself?" Defendant answered that he understood this fully but he did not have any confidence in the public defender's office. The court warned defendant that he would be required to follow all the rules of the courtroom and that he would not receive any special services or privileges. Library access would be provided in accordance with jail rules. The court then asked defendant to recount his educational background. Defendant replied that he had "a GED" and had completed at least one semester at junior college. Defendant answered in the affirmative when the court asked whether he could read and write at a junior college level. Defendant explained that he was familiar with legal procedures because "I've come to court a lot of times on a lot of different charges and I've spent a lot of time in the courtroom." Judge Levis found defendant competent to waive counsel and relieved the public defender's office.

Defendant represented himself at the preliminary hearing. However, he accepted representation by the public defender's office after probable cause was found and an information filed.

At the trial readiness conference on August 12, defendant was represented by Stephen Quade on behalf of defendant's assigned attorney, Ralph Torres. However,

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4 *Faretta v. California* (1975) 422 U.S. 806.

defendant asked to speak to the court personally, stating, "I just want to say I wanted to proceed on the regular scheduled date and time for my jury trial," and "if the attorney is not ready, then I'll proceed pro per."

On August 16, the matter was called for trial by Judge Levis. Torres appeared on behalf of defendant. Torres told the court that he had notes from Quade stating that defendant wanted to proceed pro. per. Defendant then broke in with a lengthy "correction," as follows:

> "THE DEFENDANT: No, that is not correct, Your Honor.
>
> "Mr. Torres told me he won't be able to proceed on this date. And I told him if that was the case then I would probably have to go pro per, but in addition to that, Your Honor, Mr. Torres has been -- he violated my attorney-client privilege rights by giving the district attorney information regarding my case without even letting me know this is what he was going to do because the district attorney, in fact, interviewed one of my witnesses who I never talked with the district attorney before [*sic*]. But one of the district attorney investigators interviewed one of my witnesses, and only person that they could have got that information from was from Mr. Torres."

Both Torres and the prosecutor immediately denied defendant's accusation. They stated that the defense had not provided a witness list to the People. The prosecutor also stated that he had not even assigned an investigator to work on the case. Nonetheless, defendant insisted that Torres had betrayed him, stating, "I have [a] letter from the witness saying different."

The court then queried whether defendant was stating that he wanted to represent himself and that he wanted to go to trial as quickly as possible. Defendant answered, "Yes, Your Honor. I am prepared to proceed. But now at the same time, I would like for the Court's to appointment [*sic*] a lawyer other than Mr. Torres just for the technical aspects of the proceedings." The court answered, 'I am [not] going to appoint standby counsel that would be up to the judge if the judge, at the trial, believes that to be necessary, he may do so. But, Mr. Asberry, you are stating to me that you are competent

to represent yourself?" Defendant answered, "I am. And I am prepared to, yes." The court then told defendant that "if you are representing to me that you are fully prepared to represent yourself and proceed to trial, you can't have it both ways. You can't say I want to represent myself, and I want to go to trial right now. But I want to have somebody sitting in back there advising there on technical issue. That is not going to work." Defendant responded: "I apologize for that. I didn't mean it like that. What I meant to tell you, what I am prepared to proceed in pro per and timely mannor [*sic*]. And I am prepared to go whenever the district attorney is prepared. And I would like to go today. Actually, it was suppose to start today. I am prepared to start today." He concluded by stating, "And I don't want this man to represent me at all."[5]

Judge Levis then referenced the May 25 *Faretta* hearing he had conducted, asking whether defendant remembered that proceeding. Defendant answered in the affirmative. He also answered in the affirmative when the court asked, "Do you remember we went through an awful lot of rights and responsibilities," and whether he had "all of that firmly in mind?" The court then asked whether defendant understood that the consequences of being convicted are extremely serious and that defendant could "spend [an] awful long time in state prison on this charge." Defendant answered, "Yes." The court then reiterated, "And, at this point, you are requesting to represent yourself; is that correct?" Defendant answered, "Yes, I am."

After the court further reiterated the disadvantage defendant would be under because of his lack of legal training, defendant then asked to "say something." He "want[ed] to state for the record that I don't trust Mr. Torres. And I understand what you

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[5] The reporter's transcripts are replete with errors. In the transcript of the August 16 proceeding, the court reporter mistakenly attributed this final comment to the court. However, when read in context, it is obvious that defendant made this remark.

were saying in terms of disadvantages I am going to be facing by going to trial with experienced attorney [*sic*]. But on the other hand, this man right here has done some things behind my back .... [¶] … I don't trust this man. So I feel like I would have [a] better chance by proceeding in pro per to giving my honest effort as opposed to him giving a fictitious one." Recognizing that defendant had not expressed himself clearly, the court asked defendant whether he wanted another attorney to represent him. Defendant replied that by his calculations the 22d or 23d day of the month was the last day for his trial to begin. If a competent attorney could be appointed and ready for trial within this timeframe, he would accept "it." The court explained to defendant that one could not reasonably expect to find an attorney who would accept the appointment and be prepared to go to trial within this short timeframe. Defendant needed to decide whether he wanted to go to trial this week and represent himself or, if he were willing to waive time, to make a *Marsden* motion and seek appointment of another attorney. The choice "is up to you." The court concluded by cautioning defendant that he could not guarantee that he would grant a *Marsden* motion after hearing. Defendant answered that he was "ready to proceed pro per" because "I am tired of sitting [in] jail." The court then relieved the public defender's office and sent the case out for trial assignment.

Judge Kane arraigned defendant the following morning on the first amended information and trial commenced.

*B. Analysis***.**

Defendant's interconnected arguments are all premised on a distorted and selective interpretation of the record. Our careful review of the entirety of the August 16 hearing convinces us that defendant had two fixed goals: (1) for trial to commence immediately, and (2) to dismiss Torres. Defendant did not want "that man" to represent him under any circumstances, and he was not willing to waive his right to a speedy trial to pursue substitution of counsel.

There is no record support for defendant's assertion that he might well have been willing to waive time if a new attorney had been appointed. Defendant repeatedly expressed an unwavering desire to commence trial immediately. He was offered a *Marsden* hearing. He refused it when the trial court correctly explained to defendant that substitution of a new attorney would necessarily require continuance of the trial date so the attorney could prepare for trial. When this choice was given to him, defendant decided that he would proceed in pro. per. because he was tired of "sitting [in] jail." Defendant's insistence on trial within the statutory period effectively precluded appointment of another attorney.[6]

Moreover, both Torres and the prosecutor responded to defendant's charge that Torres had improperly given witness information to the People. Thus, defendant's central complaint about Torres was explored during the proceeding even though a formal *Marsden* motion was not held. While in certain circumstances the trial court may also have an obligation to determine why an attorney is not available for trial within the statutory period (see, e.g., *People v. Noriega* (1997) 59 Cal.App.4th 311, 320, fn. 4), this is not such a case. Defendant repeatedly and adamantly declared that he did not want Torres to represent him. This decision was based on defendant's belief that Torres had betrayed him, not because Torres was allegedly unable to proceed on the scheduled trial date. Defendant was unswayed by the prosecutor's and Torres's denials of his claim that Torres had provided witness information to the People. As explained above, defendant did not want to substitute counsel because this course of action would require a continuance. Instead, defendant freely elected to go to trial immediately, without Torres.

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6 Accordingly, we find defendant's reliance on *People v. Cruz* (1978) 83 Cal.App.3d 308 and *People v. Hill* (1983) 148 Cal.App.3d 744 to be misplaced. In neither case did the appellant insist on a speedy trial or refuse a *Marsden* hearing.

Only if the court had found defendant incompetent to represent himself would assessment of Torres's availability within the statutory period have been necessary.

The prosecutor and Judge Levis did not improperly coerce defendant into rushing to trial. It was defendant who insisted on exercising his right to trial within the 60-day statutory period. He repeatedly refused to waive his speedy trial right. This is defendant's constitutional and statutory prerogative. (§ 1382; Cal. Const., art. I, § 15.) The trial court is not at fault for acceding to defendant's twin demands for a speedy trial and dismissal of Torres through assertion of his self-representation right. The court could not force defendant to waive his speedy trial right and accept a *Marsden* hearing which might have resulted in appointment of a new attorney. Defendant was offered this choice, and he rejected it. Likewise, the prosecutor did not have an ethical obligation to argue against defendant's desired course of action.

Ritualistic advisement is not a condition precedent to a knowing and intelligent waiver of counsel. (*People v. Paradise* (1980) 108 Cal.App.3d 364, 371.) Rather, "[t]he test of a valid waiver of counsel is not whether specific warnings or advisements were given but whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1225.) On review, we consider the entire record to determine whether the invocation of the right to self-representation was knowing and intelligent. (*Id*. at p. 1224.) The record here affirmatively establishes that defendant's waiver of counsel and his insistence on a speedy trial were decisions he knowingly and freely made "'with eyes open.'" (*Faretta v. California, supra,* 422 U.S. at p. 835.) Defendant understood the charges and the penal consequences if he lost at trial. He knew that he could expect no special advice or assistance during his trial. He had been warned that his opponent at trial would be experienced and highly skilled. He had represented himself during the preliminary hearing and thus had first-hand experience

with the difficulties he would encounter because of his lack of legal training. Therefore, we conclude that defendant validly waived his right to counsel.

II. Failure to appoint advisory counsel was not an abuse of discretion.

We have determined that defendant validly waived his right to counsel after being duly warned of the risks and dangers of this course of action. As set forth, *ante*, near the beginning of the August 16 proceeding, defendant asked Judge Levis to appoint an attorney other than Torres "just for the technical aspects of the proceedings." Judge Levis responded that he was not going to appoint standby counsel but that if the trial judge believed this was necessary, he may do so. Defendant subsequently affirmed to Judge Levis that he was ready to proceed to trial immediately without counsel. Defendant did not request advisory counsel during trial.

Defendant asserts that Judge Levis's refusal to appoint advisory counsel was per se reversible error. He also argues that notwithstanding his failure to request appointment of advisory counsel during trial, Judge Kane had a sua sponte obligation to provide advisory assistance because he had stated at the outset of the proceeding that although he wanted to represent himself, he had "no knowledge" about "bringing up my priors."

We agree with respondent's position that these contentions must be rejected because they are premised on the fallacious assumption that in noncapital cases there exists a *right* to appointment of advisory or standby counsel and that the failure to provide such assistance may constitute reversible error. Furthermore, even were we to have concluded that such a right exists under California law, abuse of discretion has not been shown in connection with the denial of defendant's pretrial request before Judge Levis or Judge Kane's failure to offer such assistance sua sponte during trial.

People v. Garcia (2000) 78 Cal.App.4th 1422 is directly on point, and we agree with both its reasoning and result. Garcia was charged with noncapital murder and attempted murder. He validly waived his right to representation and was convicted after jury trial. He argued on appeal that his presentation of a defense was incompetent and

the conviction must be reversed because the court did not appoint advisory counsel. The majority of the panel rejected this argument, holding that in noncapital cases where a court does not exercise its inherent power to appoint advisory counsel, "a defendant who has competently elected to represent himself should not be heard to complain that he was denied the assistance of advisory or stand-by counsel." (*Id*. at p. 1431.)

Garcia explained that both the United States and California Supreme Courts had affirmed the power of trial courts to appoint standby counsel even over the objection of the accused in order to promote orderly, prompt and just disposition of the case. This is inherent in the trial court's power to control the proceedings. Yet, the power of a trial judge to appoint advisory counsel as part of its inherent obligation to control the proceedings is not equivalent to a right possessed by defendants who have chosen to represent themselves to nevertheless demand advisory or standby counsel. (*People v. Garcia*, *supra*, 78 Cal.App.4th at p. 1430.)

Furthermore, the United States Supreme Court has also made it clear that a trial judge is not required to permit hybrid representation and that a defendant who exercises his right to represent himself cannot later complain that the quality of his defense amounted to a denial of the effective assistance of counsel. (78 Cal.App.4th at p. 1430.) This rule would be eviscerated if a defendant who exercises his right to represent himself is allowed to later challenge a verdict on ground that he or she was not provided with advisory counsel. "To permit such a challenge is to allow a defendant to complain that because of the poor quality of his self-representation, he was improperly denied effective assistance of counsel in the form of a hybrid representation." (*Id*. at pp. 1430-1431.)

Garcia also concluded that *People v. Bigelow* (1984) 37 Cal.3d 731, which is relied on by defendant here, did not compel a contrary result. *Bigelow* held that the trial court's denial of a request for advisory counsel made during the capital murder trial of a self-representing Canadian defendant with a ninth grade education was reversible error. The trial court had erroneously concluded that California law did not permit appointment

of advisory counsel. The high court disagreed and further concluded that denial of Bigelow's request for legal assistance was an abuse of discretion and per se reversible. (*Id.* at pp. 742-746.) *Garcia* analyzed this opinion and explained that the holding was largely based on the unique nature of the punishment Bigelow faced. The high court had pointed out that capital cases raise legal and factual issues beyond those involved in an ordinary trial, particularly since Bigelow's trial arose under the 1978 death penalty which had not yet been judicially interpreted. Both the majority and concurring opinions agreed that *Bigelow* was limited to capital cases and, absent specific direction from our Supreme Court, its holding should not be extended to noncapital criminal matters. (*People v. Garcia*, *supra*, 78 Cal.App.4th at pp. 1429, 1432.)

We agree with the *Garcia* majority opinion and will follow its reasoning and result. Thus, because defendant competently elected to represent himself, he cannot state a cognizable claim of error arising from either Judge Levis's or Judge Kane's failure to appoint advisory counsel.

III. Failure to appoint an investigator was not an abuse of discretion.

Defendant argues that the failure to provide him with an investigator constitutes reversible error. Again, we disagree. At no time did defendant show why an investigator was necessary to preparation of his defense. Having failed to satisfy the predicate for exercise of the right to ancillary defense services, the denial of his requests was proper.

A. Facts.

During the *Faretta* hearing on May 25, defendant asked for an investigator. Judge Levis replied:

> "You have to make a motion and you have to show the reason you need the investigators and the anticipated number of hours that he would be required to investigate and the anticipated amounts of money that it would cost, so that has to come forth in a motion."

Defendant answered, "Okay."

The clerk's transcript contains a handwritten document dated August 5 titled notice of motion for appointment of investigator. However, there is no indication in the record that this document was ever filed or served. Counsel appeared for defendant on August 5 and continued the case to August 16. The reporter's transcript of this proceeding contains no reference to this document, and neither defendant nor his attorney requested appointment of an investigator.

At the conclusion of the hearing on August 16, defendant stated, "I am going to need [an] investigator." Judge Levis replied, "That I will leave to the trial court judge and they will appoint an investigator because you are going into trial right now on that case, on the case where you are representing yourself." Defendant answered, "Right." The court then clarified, "The trial court judge should rule on that." Defendant responded, "Thanks."

On August 17, defendant complained to Judge Kane that he had been unable to contact witnesses from the jail. He also commented that he "wanted to have an investigator go out, but I don't know if I'm going to have time, just to go out to the crime scene and check on one thing." Defendant did not indicate that he had submitted any written notice of motion or had previously requested investigative assistance. Judge Kane ruled that it was "a little late in the game to request an investigator." However, he ordered defendant to be given 45 minutes of telephone time per day during trial.

B. Analysis.

One "who chooses to represent himself assumes the responsibilities inherent in the role which he has undertaken." (*People v. Redmond* (1969) 71 Cal.2d 745, 758.) A defendant exercising his right to ancillary defense services must "demonstrate a need for the service by reference to 'the general lines of inquiry he wishes to pursue, being as specific as possible.'" (*People v. Faxel* (1979) 91 Cal.App.3d 327, 330.) Defendant did not satisfy this obligation.

On May 25 defendant was told that to obtain investigative services he must file a motion showing why he needed an investigator, the anticipated number of hours that would be required, and the anticipated cost. He did not do so. There is nothing in the record indicating when or how the written notice of motion came to be part of the clerk's transcript; there is no hint in any of the various reporter's transcripts that this document was ever presented to a judicial officer. In any event, defendant's moving papers did not set forth the necessity of investigative services. During the August 16 proceeding defendant did not explain why an investigator was necessary to preparation of his defense. On August 17 he merely told Judge Kane that he wanted the investigator to check on "one thing at the crime scene." Even on appeal, defendant did not specify the usefulness of an investigator. Accordingly, we conclude that denial of defendant's requests was not an abuse of discretion. (*People v. Faxel, supra*, 91 Cal.App.3d at p. 331 [denial of self-representing defendant's request for investigator and runner upheld where necessity of investigative services was not shown].)

IV. Defendant received his *Boykin/Tahl*[7] advisements and voluntarily admitted the special allegations.

Next, defendant argues that his admissions of the enhancement and prior strike/prison term allegations were not voluntary and intelligent under the totality of the circumstances. Specifically, he contends that the court erred by failing to use the term "self-incrimination" when giving his *Boykin/Tahl* advisements, that he should have been told that he had a right to bifurcation and that an explicit waiver of his right to counsel was required prior to acceptance of his admissions. In a related argument, he contends that he should have been advised of the exact penal consequences of the admissions. As will be explained below, defendant was given the required *Boykin/Tahl* advisements, and

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[7] *Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.

he waived the failure to advise him of the maximum period of confinement by not interposing timely objection.

A. Facts.

At the commencement of proceedings on August 17, defendant was arraigned on the first amended information. The court asked defendant if he would waive recitation of his rights. Defendant answered in the negative. The court then explained that the primary right he needed to be advised of was the right to counsel. Judge Kane stated, "I take it you've previously requested that the Court relieve your attorney that was appointed before so you could represent yourself." Defendant answered, "That is correct." The court asked, "And that's still your desire that you not have represent --" Defendant interrupted, "With respect for the actual trial -- me handling the trial, I still wish to go pro per. However, I don't have any technical aspects on the prior -- the prior proceedings. I don't have no knowledge of how that goes." The court asked, "What prior proceedings?" Defendant replied, "As far as bringing up my priors, my strikes, my prior strikes." The court replied, "Okay. Well, we'll talk about that in a minute. But basically, you know, you have the right -- you previously waived your right to an attorney, so you're proceeding representing yourself. And you have a right to a jury trial, which, of course, we're going to proceed with now." Defendant answered, "Right." The prosecutor then stated that defendant has the right "to an attorney, a right to a jury trial of 12 persons, he has a right to cross-examine witnesses. I think it would essentially be the same rights as to when he would be changing a plea should be informed of him probably now as well to be safe [*sic*]." The court agreed with the prosecutor and further explained that defendant has the right to call witnesses and to cross-examine witnesses called by the prosecutor, and he also has "the right to testify or not to testify as you choose during the trial. Defendant stated, "I understand those rights."

The court then asked defendant if he was pleading guilty or not guilty to the robbery. Defendant replied, "not guilty." The court asked if he was denying the age

enhancement. Defendant replied that he was not. The court asked defendant whether he was admitting that he knew or should known that the victim was greater than 65 years old. Defendant answered in the affirmative. The court then said, "I have to ask you, you understand that the People have the obligation to prove that beyond a reasonable doubt, unless the Court accepts your admission? And that you have a right -- all the trial rights that would go with the robbery count, go to this allegation as well?" Defendant answered in the affirmative. The court then reiterated, "So if I accept your admission to this allegation that means you're giving up your right to a trial on that issue. You're giving up the right to cross-examine witnesses, to testify or not testify on your own behalf, to subpoena witnesses, et cetera. You would be giving up those rights because you would be admitting it is true, which means they wouldn't have to prove it." Defendant stated that while he did not know the victim's age, "I guess I could have known. He could pass for 65 years old. That's fine with me. I'll admit that." The court reiterated that defendant was giving up his right to a trial on this issue. Defendant answered, "Okay." The court pointed out that the "admission does not come into play unless they successfully convict you of the robbery," and then accepted his admission to the age enhancement allegation.

Next, defendant admitted the four prior prison term allegations. During a colloquy between the court and the prosecutor concerning the way the information had been drafted, defendant broke in and raised the following query: "Just for the purpose of saving time none of this is really important unless I'm found guilty; is that correct?" The court answered, "That's correct." Defendant then said, "So I'll submit to all of this, just for the sake of that, and we can move on with the trial." The court replied, "Okay. But unfortunately before I can accept that I have to ask you questions to make sure that you understand what you're doing." Defendant answered, "Okay."

The court then asked defendant if he admitted the first prior strike allegation. Defendant replied that he was "not sure." The court stated that it could not accept his

admission if he was not sure and queried whether defendant would like to look at some court documents. Defendant then stated, "You know what, your Honor, I'm going to go ahead and admit to all of it, because if I'm found guilty it really wouldn't matter if that was important or not." The court replied, "Well, it could matter, it could affect your sentence. It could affect the length of the sentence." Defendant answered, "I understand what you're saying, but the way I'm looking at it, the sentence, if I'm killed with a hammer or a gun, I'm still dead." The court answered, "I can't let you admit to something that you don't believe is true." Defendant answered, "I admit to it. I admit to it." Defendant then admitted each of the six prior strike allegations.

After a discussion concerning the use of defendant's prior convictions at trial, the court returned to the *Boykin/Tahl* advisements. It asked defendant whether he understood that he did not have to admit the special allegations. Defendant answered, "Right." The court said, "Because if you don't, you can deny those, [the prosecutor] would have to prove that each and every one of those allegations are true beyond a reasonable doubt and that would be his burden to prove." Defendant answered, "That's correct." The court continued, "And by admitting those, you're saying, [prosecutor], you don't have to prove it, I'm admitting it." Defendant answered, "Yes." The court stated, "Okay. And you would have the right to require him to prove it. And as part of that right, part of that trial in front of this jury, you would have the right to cross-examine all of his witnesses, review witnesses, testify or not testify as you choose." Defendant acknowledged that he knew he was giving up all these "trial rights." Only then did the court accept defendant's admissions to the balance of the first amended information "as having been knowingly and voluntarily made." The court then turned a second time to "the issue of the admissibility of [defendant's] prior criminal history."

B. Analysis.

Before a criminal defendant enters a guilty plea or admits a prior conviction for sentencing purposes, he must be advised that, as a result of his plea, he is forfeiting three

constitutional rights: (1) the privilege against compulsory self-incrimination, (2) the right to trial by jury, and (3) the right to confront and cross-examine witnesses. (*Boykin v. Alabama, supra,* 395 U.S. at p. 243; *In re Tahl, supra,* 1 Cal.3d at pp. 132-133; *In re Yurko* (1974) 10 Cal.3d 857, 863.) In the absence of express admonitions and waivers, the test for prejudice is whether the record indicates that the plea or admission was voluntary and intelligent under the totality of the circumstances. (*People v. Howard* (1992) 1 Cal.4th 1132, 1178.)

The record here affirmatively establishes that defendant received the required advisements. Defendant was told that he had a right to trial of the special allegations, that he did not have to admit they were true, that the prosecutor bore the burden of proof and would be required to introduce evidence proving the allegations, that he did not have to testify, and that he could cross-examine witnesses and call witnesses of his own. This satisfies *Boykin/Tahl*. Exact legal terminology is not required, and the court may use layman's language to ensure defendant understands his constitutional rights. (*In re Tahl, supra,* 1 Cal.3d at p. 132.) In explaining to defendant that he had a right to deny the special allegations, to require the prosecutor to prove them, and to testify or not testify on his own behalf, the trial court adequately conveyed the meaning of self-incrimination. (*People v. Howard, supra,* 1 Cal.4th at p. 1180.)

During arraignment on the first amended information, defendant reaffirmed to the trial court that he had waived his right to counsel and wanted to represent himself. Since Judge Kane had just taken a waiver of counsel from defendant, he was not required to renew the advisement of this right prior to accepting defendant's admissions. (Cf. *People*

v. Harbolt (1988) 206 Cal.App.3d 140, 151-152.) Furthermore, the prosecutor also stated that defendant had the right to counsel when he enumerated defendant's rights.[8]

Trial bifurcation procedure is not constitutionally mandated (*People v. Harris* (1992) 8 Cal.App.4th 104, 108), and it has never been included in the list of mandatory advisements. Defendant offers no California case holding that an advisement of the right to a bifurcated trial is required under *Boykin/Tahl*.

We are convinced that defendant was given the required *Boykin/Tahl* advisements and he freely, knowingly, and voluntarily admitted the special allegations. In fact, defendant was so eager to admit the special allegations that the trial court had to stop the proceedings and explain to defendant that it was important that he understood his rights. Defendant's strategy was clear--to focus his energies on the robbery count and fight for an acquittal. If he was successful, his admissions would be meaningless. It was a gamble and one he lost. Neither error nor prejudice appears.

In addition to the *Boykin/Tahl* advisements, a judicially created rule of criminal procedure requires a criminal defendant who admits a prior conviction allegation to be advised of certain penal consequences of his admission, including the exact increase in terms that might be imposed and the effect on the defendant's eligibility for parole. (*In re Yurko, supra*, 10 Cal.3d at p. 864.) However, advisement of penal consequences is not constitutionally mandated and is subject to the waiver doctrine. (*People v. Wrice* (1995) 38 Cal.App.4th 767, 770-771.)

Defendant contends that Judge Kane erred by not advising him of the exact increase in his prison sentence he faced as a result of his admissions. We agree that

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8 As mentioned, *ante*, when one reads the transcript of the entire proceedings that morning, it is apparent that defendant's statement regarding his "lack of knowledge" about "bringing up the prior proceedings" referenced use of his prior criminal history at trial. Defendant was not attempting to invoke his right to counsel.

defendant did not receive this specific advisement. However, defendant reviewed the probation report prior to sentencing and therefore had notice of the exact penal consequences of his admissions and an opportunity to object prior to imposition of sentence. (38 Cal.App.4th at p. 771.) He failed to do so. As a result, he waived any claim of error in connection with the failure to inform him of the precise maximum period of confinement. In any event, the omission was harmless; the record affirmatively shows that defendant would have admitted the special allegations even if he had been told the exact period of maximum confinement. (*In re Moser* (1993) 6 Cal.4th 342, 352.) Prior to accepting his admissions, Judge Kane explained to defendant that the length of his sentence would be increased if he were convicted of robbery. Defendant colorfully responded, "I understand what you're saying, but the way I'm looking at it, the sentence, if I'm killed with a hammer or a gun, I'm still dead."

V. Denial of a continuance was not an abuse of discretion.

A Mr. Taleisnik appeared with defendant at the September 16 sentencing hearing. He requested a continuance for "a few weeks" so that arrangements could be made with an unnamed family member to retain him on defendant's behalf and to provide him with an opportunity to review the case. He had been in contact with defendant almost daily for the past week but had not yet connected with the family member who defendant told him had the "ability to retain." The request was denied. Judge Kane reasoned: "You haven't been retained. There is no guarantee that you will be retained. Case has been in existence a long time. A verdict was August 19. Apparently you had multiple contacts with the family. You still have not been retained. I don't see any good cause to continue this under the circumstances."

Defendant argues that the refusal to continue the sentencing hearing was a prejudicial abuse of discretion. Once again, we are unconvinced.

Continuances are to be granted only on a showing of good cause, and the trial court possesses great discretion in ruling upon a request for a continuance. The

defendant bears the burden of establishing that this traditionally broad grant of discretion was abused. (*People v. Beeler* (1995) 9 Cal.4th 953, 1003; *People v. Blake* (1980) 105 Cal.App.3d 619, 624.)

A continuance to obtain counsel may be denied if the accused has been unjustifiably dilatory. (*People v. Byoune* (1966) 65 Cal.2d 345, 346.) Defendant had a reasonable opportunity to retain counsel prior to sentencing, and he failed to do so. He was convicted on August 19, and almost a full month elapsed before he was sentenced on September 16. The record supports the trial court's conclusion that there was no assurance when, or even if, Mr. Taleisnik would be retained. Defendant had been in contact with Mr. Taleisnik almost daily for a week prior to the sentencing hearing, and no arrangements had been made. There was no assurance that the unnamed family member would agree to retain Mr. Taleisnik on defendant's behalf even if the continuance were granted. Defendant did not indicate that he was willing to accept the services of the public defender's office. Thus, defendant did not definitively show that a continuance would have been useful. Furthermore, defendant should have moved for a continuance when he first determined that he no longer wanted to represent himself and not waited until the day of sentencing.

People v. Trapps (1984) 158 Cal.App.3d 265, which is relied on by defendant, is distinguishable. There, appellant requested a continuance of sentencing to substitute counsel. The request was denied because the court summarily determined that defendant's current attorney was adequate. Here, defendant had a reasonable opportunity prior to the hearing to either retain counsel or request a continuance. He failed to do either. Moreover, there was no assurance that Mr. Taleisnik would be retained if the continuance were granted.

Under these circumstances, denial of a request for a multi-week continuance was not an abuse of discretion and did not violate defendant's right to due process of law.

(*People v. Beeler*, *supra*, 9 Cal.4th at pp. 1003-1004; *People v. Carr* (1964) 229 Cal.App.2d 74, 77.)

DISPOSITION

The judgment is affirmed.

_____
Buckley, J.

WE CONCUR:

_____
Ardaiz, P.J.

_____
Harris, J.